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Section 1988: An Alternative to Vicarious Liability Under the Civil Rights Act of 1871: *Gronquist v. Gilster*, No. CV77-L-3 (D. Neb. Nov. 16, 1978)

James E. Papik

University of Nebraska College of Law, jamespapiklaw@windstream.net

Note

Section 1988: An Alternative to Vicarious Liability Under the Civil Rights Act of 1871

Gronquist v. Gilster, No. CV77-L-3 (D. Neb. Nov. 16, 1978).

I. INTRODUCTION

Section 1983[1] provides a federal remedy for individuals deprived of their civil rights by persons acting under color of state law.[2] In *Sebastion v. United States*,[3] the Eighth Circuit held the doctrine of respondeat superior[4] "inapplicable to an action for deprivation of civil rights."[5] Although numerous authorities support the *Sebastion* decision,[6] exceptions to the general rule have been created.[7] In *Gronquist v. Gilster*,[8] plaintiff's motion for a new trial

1. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1976)) provides:
   > Every person who, under color of any statute, ordinance, regulation, custom of usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
2. *Id.*
3. 531 F.2d 900 (8th Cir. 1976).
4. The common law doctrine of vicarious liability holds *A* liable for *B*'s negligent acts because of a certain relationship between *A* and *B*. Respondeat superior refers to the master-servant relationship. However, the terms are often used interchangeably. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 69, at 458-59 (4th ed. 1971).
5. 531 F.2d at 904.
6. *See generally* Cotton v. Hutto, 577 F.2d 453 (8th Cir. 1978); Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974); Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973); Adams v. Pate, 445 F.2d 105 (7th Cir. 1971); Knipp v. Weikle, 405 F. Supp. 782 (N.D. Ohio 1975); Moore v. Buckles, 404 F. Supp. 1382 (E.D. Tenn. 1975); Townes v. Swenson, 349 F. Supp. 1246 (W.D. Mo. 1972).
7. *See* Baskin v. Parker, 588 F.2d 965 (5th Cir. 1979); Taylor v. Gibson, 529 F.2d 709 (5th Cir. 1976); Tuley v. Heyd, 482 F.2d 590 (5th Cir. 1973); Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973); Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971); Campise v. Hamilton, 382 F. Supp. 172 (S.D. Tex. 1974); Lucas v. Kale, 364 F. Supp. 1345 (W.D. Va. 1973); Salinas v. Flores, 359 F. Supp. 233 (S.D. Tex. 1973).
8. No. CV77-L-3 (D. Neb. Nov. 16, 1978).

based on the court's failure to instruct the jury on vicarious liability was denied by the appellate court. This note will analyze *Gronquist* to determine whether it should fall within an exception to the *Sebastion* holding. In addition, two alternative causes of action will be suggested which might lead to recovery under similar factual circumstances.

II. THE *GRONQUIST* DECISION

A. The Facts

The plaintiff brought an action against the Sheriff of Lincoln County, Nebraska, pursuant to 42 U.S.C. § 1983. The complaint alleged that while plaintiff was confined in the Lincoln County jail he informed the sheriff and other county personnel of his diabetic condition. It alleged that the plaintiff was denied adequate medical care, resulting in physical harm;. that he was threatened and beaten while confined; and that these actions violated his eighth amendment rights.[9] The evidence, "viewed in the light most favorable to the plaintiff established that Gronquist was confined in the Lincoln County jail; that he asked Gilster's deputies for medical treatment; that the medical treatment was not rendered until Sheriff Gilster became aware personally of Gronquist's condition; and that Gilster immediately upon learning of the situation arranged for medical care."[10]

The jury was instructed that only the acts or omissions of the sheriff could result in his liability. After the jury found for defendant, plaintiff moved for a new trial, claiming " 'that the court erred in failing to instruct the jury on liability based upon the theory of respondeat superior.' "[11]

B. Plaintiff's Contention

Plaintiff found support for his motion under a Nebraska statute[12] which holds a sheriff responsible for the acts of his deputy. In addition, the plaintiff relied on *Hesselgesser v. Reilly*,[13] a Ninth Circuit decision which held a sheriff liable for his deputy's acts under section 1983 when state law authorized such liability:

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9. No. CV77-L-3, slip op. at 1.
10. *Id.*
11. *Id.*
12. NEB. REV. STAT. § 84-801 (Reissue 1976) provides: "*State and County officers; deputies.* The Auditor of Public Accounts, State Treasurer, and State Librarian respectively, and each county register of deeds, treasurer, sheriff, clerk, and surveyor, may appoint a deputy, for whose acts he shall be responsible, and from whom he shall require a bond . . . ."
13. 440 F.2d 901 (9th Cir. 1971).

> [P]laintiff's claim against these defendants is based upon Washington statutes which establish the authority and duties of sheriffs and deputy sheriffs and provide that sheriffs shall be liable for the negligence "and misconduct" of their jailors and other deputies. . . .
>
> The Civil Rights Act does not itself specifically establish a basis for liability, vicarious or otherwise, against persons who do not participate in a civil right violation. . . . Thus if one who did not participate in such violation is to be held liable for the civil rights violation of another on principles of vicarious liability, or by reason of statutory responsibility, it must be because: (1) *the Civil Rights Act gives recognition to the laws of the states pertaining* to such liability and, (2) *the laws of the particular state where the action arose create such liability.*[14]

By holding the sheriff liable for the conduct of his deputy, the *Hesselgesser* court determined that both of these tests had been satisfied.[15]

C. The Court's Rejection

In refusing to follow the *Hesselgesser* interpretation of section 1988 in *Gronquist*, the court relied primarily upon two Supreme Court cases: *Moor v. County of Alameda*,[16] and *Monell v. Department of Social Services*,[17] neither of which is persuasive as applied to the facts in *Gronquist*.

In *Moor*, plaintiffs brought suit against the county under sections 1983 and 1988 for violation of their civil rights by a deputy sheriff.[18] Their claim was that under the California Tort Claims Act[19] the county was vicariously liable for the acts of the sheriff

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14. *Id.* at 902-03 (emphasis added).
15. Civil Rights Act of 1871, ch. 31, § 3, 14 Stat. 27 (codified at 42 U.S.C. § 1988 (1976)) provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,'. . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

16. 411 U.S. 693 (1973).
17. 436 U.S. 658 (1978).
18. On these facts, the plaintiffs could have possibly asserted a direct cause of action against the county for a fourteenth amendment violation. *See* notes 36-54 & accompanying text *infra*.
19. CAL. GOV'T CODE § 815.2(a) (West 1966) provides: "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."

and his deputies committed in violation of the plaintiffs' civil rights. Plaintiffs alleged that section 1983 was not "fully 'adapted' to the protection of federal civil rights or [was] 'deficient in the provisions necessary to furnish suitable remedies' within the meaning of § 1988."[20]

In considering the proper role of section 1988 in federal civil rights litigation, the Court concluded that it was not intended "to authorize the federal courts to borrow entire causes of action from state law."[21] It reasoned that section 1988 was not an independent act of Congress within the jurisdiction-conferring statute,[22] and therefore, was only to instruct federal courts as to the source of law to apply.[23] In addition, it considered its decision in *Monroe v. Pape*,[24] which held that municipalities were not "persons" subject to section 1983 actions,[25] and concluded that to hold the county liable under section 1988 would be "inconsistent with the Constitution and laws of the United States."[26]

The plaintiffs in *Moor* relied upon *Hesselgesser* as authority for their cause of action, but the Court noted an important distinction:

> In *Hesselgesser* the Court of Appeals ruled that a sheriff could be held vicariously liable in damages for the wrongful act of his deputy which deprived a prisoner of his civil rights where state law provided for such vicarious liability. The court. . . found authority for incorporation of state law into federal law in § 1988, *but it was acting in the context of a suit brought against the sheriff on the basis of § 1983.* . . . These decisions simply do not support the suggestion that § 1988 alone authorizes the creation of a federal cause of action against the County.[27]

D. Analysis

Gronquist was in the context of a section 1983 action against a sheriff. Accordingly, it cannot be distinguished from *Hesselgesser*, which was left undisturbed by the Court's opinion in *Moor*.[28] A

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20. 411 U.S. at 700.
21. *Id.* at 702.
22. 28 U.S.C. § 1343(4) (1976):
    > The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
    > . . . .
    > (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.
23. 411 U.S. at 705.
24. 365 U.S. 167 (1961), *overruled in part*, Monell v. Department of Social Serv., 436 U.S. 658 (1978). *Monroe* was overruled only to the extent it granted local governmental units total immunity from section 1983 liability.
25. 365 U.S. at 191.
26. 411 U.S. at 706.
27. *Id.* at 704 n.17 (emphasis added).
28. *But see* Knipp v. Weikle, 405 F. Supp. 782, 785 n.4 (N.D. Ohio 1975).

closer reading of *Moor* would indicate that when an independent basis for subject matter jurisdiction exists in a section 1983 action, section 1988 may be used to apply state law on the question of statutory liability.[29]

The second reason relied upon in *Moor* to discount plaintiff's section 1988 claim—that it was inconsistent with its previous holding in *Monroe*—must be analyzed in light of *Monell v. Department of Social Services*,[30] which overruled *Monroe* in relevant part: "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies."[31] Thus, a local government may be liable when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers" as well when "deprivations are visited pursuant to governmental 'custom.' "[32] However, the Court expressly rejected the issue of vicarious liability of a local government in a section 1983 action: "[W]e conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."[33]

Liability in *Gronquist* was not based upon a respondeat superior theory, but upon sections 1983 and 1988, which authorize federal courts to look to state law in certain circumstances.[34] In view of the fact that an independent basis for subject matter jurisdiction exists in *Gronquist*, a proper resolution of the liability issue would be to apply section 1988 to determine whether state law may be invoked on the issue of statutory liability.

29. The ultimate issue then becomes whether an independent basis of subject matter jurisdiction exists in a section 1983 action without personal involvement on part of the sheriff. *Hesselgesser* answers the question affirmatively.
30. 436 U.S. 658 (1978).
31. *Id.* at 690 (emphasis in original).
32. *Id.* at 690-91.
33. *Id.* at 691.
34. One commentator has suggested a three-part test before section 1988 may be invoked: "First, the federal act must be deficient in furnishing a remedy for the vindication of plaintiff's civil rights. Second, there must be an adequate state remedy available. Third, the state remedy must not be inconsistent with federal law." Note, CIVIL RIGHTS—*Municipalities as Parties—Waiver of Sovereign Immunity by a State does not Give a Federal Cause of Action for Damages Under Sections 1983 and 1988 of the Civil Rights Act*, 2 FORDHAM URB. L. J. 109, 114 (1973) (footnotes omitted).

III. ALTERNATIVE THEORIES OF LIABILITY

A. Direct Action Against the County for Violation of a Fourteenth Amendment Right

Because individual defendants may often be judgment-proof[35] and *Monell v. Department of Social Services*[36] prohibits municipal liability under section 1983 on a vicarious liability theory, deserving plaintiffs may be forced to pursue other remedies in order to receive adequate compensation. Many commentators[37] have advocated methods to circumvent *Monroe*.[38] Since *Monell* overruled *Monroe* only to a limited extent,[39] these alternatives remain viable when individuals are precluded from bringing suit on a vicarious liability theory.

The Supreme Court in *Bivens v. Six Unknown Named Agents*,[40] held that federal officers could be sued for damages as a result of the deprivation of a person's fourth amendment rights.[41] Since section 1983 is available only against those persons acting under color of state law,[42] no statutory remedy existed for the deprivation of civil rights by federal officers. The Court found that the United States Constitution created the remedy and that jurisdiction in federal courts existed pursuant to 28 U.S.C. § 1331(a).[43]

35. A defendant is judgment-proof if he owns insufficient assets in order to satisfy the judgment at an execution sale. *See* NEB. REV. STAT. § 25-1552 (Reissue 1978) which provides that "[a]ll heads of families . . . shall have exempt from forced sale on execution the sum of fifteen hundred dollars in personal property."
36. 436 U.S. 658 (1978). *See* notes 30-33 & accompanying text *supra*.
37. *See generally* Handt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 NW. U. L. REV. 770 (1976); Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131 (1971); Comment, *Section 1983, the Eleventh Amendment, and General Principles of Tort Immunities and Defenses: Who Is Left To Sue?*, 45 U.M.K.C. L. REV. 29 (1976); Note, 2 FORDAM URB. L. J., *supra* note 34; Note, *A Municipality Is a "Person" Under 42 U.S.C. § 1983 Where Local Law Has Abolished Sovereign Immunity*, 9 HOUS. L. REV. 587 (1972); Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201 (1971).
38. *See* notes 24-26 & accompanying text *supra*.
39. A municipal corporation may be sued when it deprives an individual of his civil rights when it has acted through official policy or by custom with the force of law. Monell v. Department of Social Serv., 436 U.S. 658, 690-91 (1978).
40. 403 U.S. 388 (1971).
41. *Id.* at 397.
42. *See* District of Columbia v. Carter, 409 U.S. 418 (1973) (section 1983 was not available as a cause of action against the District of Columbia).
43. 28 U.S.C. § 1331(a) (1976) provides in relevant part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution, laws, or treaties of the United States . . . ." Plaintiff sought damages of $15,000 from each of the six defendants.

Bivens has been used as a springboard to avoid the section 1983 limitation of *Monroe* as a basis for suit against non-persons for a violation of fourteenth amendment rights.[44] This rationale has been fortified by Justice Brennan's concurrence in *City of Kenosha v. Bruno*,[45] which involved an action against a municipality for violation of the plaintiff's fourteenth amendment procedural due process rights:

> Appellees did assert 28 U.S.C. § 1331 as an alternative ground of jurisdiction, but I agree with the Court's conclusion that existence of the requisite amount in controversy is not, on this record, clearly established. *If appellees can prove their allegation that at least $10,000 is in controversy, then § 1331 jurisdiction is available . . . and they are clearly entitled to relief.*[46]

The Court of Appeals for the Eighth Circuit recently held that a discharged chief of police could bring an action for money damages against his municipal employer after he was discharged without procedural due process.[47] The court noted that 28 U.S.C. § 1331(a) conferred jurisdiction since the amount in controversy exceeded $10,000.[48] On appeal, the defendant claimed that it was not amenable to suit under this theory.[49] In rejecting the defendant's argument, the court relied primarily upon *Bivens* and *City of Kenosha* to sustain the cause of action.[50]

It should be noted that an action of this type involves two basic assumptions: first, that a direct action does exist on a fourteenth amendment theory; and second, that the doctrine of respondeat superior[51] would impose liability upon the municipal employer. However, after *City of Kenosha*, the first assumption is at least an open question.[52] With respect to the second assumption, the question is whether or not there is any special reason for exempting municipal employers from the respondeat superior doctrine.

Municipalities function in the role of employer to the same ex-

44. City of Kenosha v. Bruno, 412 U.S. 507 (1973); Collum v. Yurkovich, 409 F. Supp. 557 (N.D. Ill. 1975); Brown v. Board of Educ., 386 F. Supp. 110 (N.D. Ill. 1974).
45. 412 U.S. 507 (1973).
46. *Id.* at 516 (Brennan, J., concurring) (emphasis added).
47. Owen v. City of Independence, Missouri, 560 F.2d 925 (8th Cir. 1977).
48. The $10,000 amount in controversy requirement may seriously impede a cause of action under this theory. One argument which has been advanced is that in eliminating the $10,000 amount in controversy requirement in 28 U.S.C. § 1343(4), Congress has implicitly declared that a violation of a person's constitutional rights is per se worth more than $10,000. *See* CCCO-Western Region v. Fellows, 359 F. Supp. 644 (N.D. Ca. 1972) which noted that "fundamental constitutional rights are 'almost by definition, worth more than $10,000.'" *Id.* at 647.
49. 560 F.2d at 927.
50. *Id.* at 933.
51. *See* note 4 *supra.*
52. The Supreme Court has not addressed this issue.

tent as do private enterprises. In view of the fact that deprivations of civil rights have been characterized as constitutional torts,[53] it seems logical to apply the tort doctrine of respondeat superior. The same policy considerations of finding a responsible defendant in a position to absorb the loss on a cost of doing business theory[54] are also applicable in the context involving a municipal employer. In effect, the taxpayers will be paying the judgment, but arguably, this should only serve to promote the hiring and electing of responsible municipal officials.

B. Section 1983 Action Against the Deputy and a Pendent State Claim Against the Sheriff

Lower federal courts are courts of limited jurisdiction for several reasons. First, their jurisdiction is limited to an Article III, "case or controversy."[55] Second, they cannot act unless Congress has by statute vested them with jurisdiction.[56] However, the judicially-created doctrine of pendent jurisdiction[57] has allowed a plaintiff to join a state law claim over which no independent basis of subject matter jurisdiction exists, with a federal claim. The courts have justified the traditional notion by exercising jurisdiction over claims to which Congress has not expressly granted jurisdiction, on the dual notions of judicial economy and convenience to the litigants.[58]

The doctrine of pendent jurisdiction was given an expansive interpretation in *UMW v. Gibbs*.[59] In this instance, plaintiff joined a state tort action for interference with contract with a federal claim under section 303 of the National Labor Management Relations Act.[60] The Court looked only to the Constitution for limitations on the exercise of jurisdiction over the state claim: "Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution . . .' and the relationship between that claim and the state claim permits the conclusion that

53. *See* Pierson v. Ray, 386 U.S. 547, 556-57 (1967).
54. *See* W. PROSSER, *supra* note 4, at 459.
55. U.S. CONST. art. III, § 2: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . ."
56. "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.
57. *See* Note, UMW v. Gibbs *and Pendent Jurisdiciton*, 81 HARV. L. REV. 657 (1968).
58. *See* UMW v. Gibbs, 383 U.S. 715 (1966).
59. *Id.*
60. Act of June 23, 1947, ch. 120, § 303, 61 Stat. 158, (codified at 29 U.S.C. § 187(a) (1976)).

the entire action before the court comprises but one constitutional 'case.' "[61] The Court went on to define a proper Article III case:

> The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[62]

Gibbs did not involve the addition of a party in the state claim over which no independent ground of subject matter jurisdiction existed. The issue of pendent party[63] jurisdiction, expressly left open in *Moor v. County of Alameda*,[64] was finally addressed in *Aldinger v. Howard*,[65] where plaintiff attempted to join her section 1983 claim against county officials with a state claim against the county under a statute that authorized liability for tortious conduct of county officials. The facts arguably satisfied the *Gibbs* test of substantiality and relatedness.[66] However, the *Aldinger* Court refused to recognize pendent party claims involving only civil rights litigants: "[W]e decide here only the issue of so-called 'pendent party' jurisdiction with respect to a claim brought under §§ 1343(3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result."[67]

To reach this result the Court focused not on Article II as in *Gibbs*, but on the statutory grant of jurisdiction in section 1983 actions:

> [W]e think a fair reading of the language used in § 1343, together with the scope of § 1983, requires a holding that the joinder of a municipal corporation, like the county here, for purposes of asserting a state-law claim not within federal diversity jurisdiction, is without the statutory jurisdiction of the district court.[68]

The test adopted in *Aldinger* is that before pendent party jurisdiction may be invoked "a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its exist-

61. 383 U.S. at 725 (emphasis & brackets in original).
62. *Id.* (emphasis in original).
63. The pendent party is one not a party to the federal jurisdiction-conferring claim. For a discussion of the evolution of pendent jurisdiction, see Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV. 127 (1977).
64. 411 U.S. 693, 715 (1973). Plaintiffs in *Moor* asserted a pendent state claim against the county based on state statute. *See* notes 16-27 & accompanying text *supra*.
65. 427 U.S. 1 (1976).
66. 383 U.S. at 725.
67. 427 U.S. at 180.
68. *Id.* at 17.

ence."[69] Although the Court did not define "negation," it did note that counties were excluded from section 1983 liability.[70] As a result, it refused to permit section 1343(3) to invoke federal jurisdiction merely because the facts also gave rise to a state action.[71]

The reasoning of *Aldinger* must be questioned since *Monell v. Department of Social Services*[72] now authorizes municipal liability in section 1983 actions. Arguably that would destroy the implicit congressional negation found in section 1343(3). Moreover, the opinion fails to look at the policies behind the exercise of pendent jurisdiction.[73] The effect of *Aldinger* is to force a plaintiff wishing to adjudicate in one suit a section 1983 claim and a factually-related state claim, to sue only in state court. In view of the fact that section 1983 was enacted to provide a federal remedy,[74] it seems only reasonable that pendent jurisdiction should be available in a section 1983 action even in a pendent party context.

The viability of a section 1983 action against a deputy and a pendent party claim under Nebraska law[75] against the sheriff, remains questionable at best after *Aldinger*.[76] The only basis for distinction is that *Aldinger* involved a pendent party claim against the county rather than the sheriff individually. An implicit negation in the jurisdiction-conferring statute would be more difficult to discern when the pendent party suit is against an individual. In addition, since *Monell*[77] now recognizes a section 1983 action against a county, the reasoning in *Aldinger* is so seriously undermined that its precedential authority is questionable.

IV. CONCLUSION

The Supreme Court's decision in *Monell v. Department of So-*

69. *Id.* at 18.
70. This assertion is no longer true after *Monell*. *See* notes 30-33 & accompanying text *supra*.
71. 427 U.S. at 17.
72. 436 U.S. 658 (1978). *See* notes 30-33 & accompanying text *supra*.
73. *See* note 57 & accompanying text *supra*.
74. Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law.") *Id.* at 242.
75. *See* note 12 *supra*.
76. After *Monroe*, there was uncertainty as to whether recovery in a state action precluded section 1983 recovery in federal court on collateral estoppel principles. However, the courts were seeking to protect two separate interests. *See* Whirl v. Kern, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969), where the court recognized a pendent claim for false imprisonment under state law in addition to his section 1983 action. However, the probable effect on damages would be a split between the two causes of action rather than an overall increase.
77. *See* notes 30-33 & accompanying text *supra*.

cial Services,[78] was long overdue in overruling *Monroe v. Pape*.[79] However, by rejecting liability based upon a vicarious liability theory, many section 1983 plaintiffs will still be unable to recover from municipal employers. Where permissible under state law, section 1988 offers a viable alternative to impose liability upon defendants not participating in the deprivation of civil rights.

In addition to the Ninth Circuit,[80] both the Fourth[81] and Fifth[82] Circuits have properly held that section 1988 permits state law, in section 1983 actions, to impose liability on a sheriff not participating in a civil rights deprivation. The Eighth Circuit's decision in *Sebastion v. United States*[83] that vicarious liability was inapplicable in a section 1983 action did not involve section 1988 and therefore is consistent with *Monell*. However, liability in a section 1983 action with reference to state law, as authorized by section 1988, is not based on the common law doctrine of vicarious liability and courts should recognize the distinction.

James E. Papik '80

78. 436 U.S. 658 (1978).
79. 365 U.S. 167 (1961), *overruled in part*, Monell v. Department of Social Serv., 436 U.S. 658 (1978).
80. Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971).
81. Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973). The court held a sheriff liable for the assault committed by two county employees acting in accordance with the sheriff's request. It distinguished vicarious liability in a section 1983 action from invoking state law to determine the extent of a sheriff's liability as authorized by section 1988.
82. Baskin v. Parker, 588 F.2d 965 (5th Cir. 1979). The court held that the action against the sheriff should not have been dismissed since the sheriff's liability for acts of his deputies was controlled by state law. However, it failed to note the distinction between vicarious liability in a section 1983 action and section 1988 authorizing state law to determine the extent of liability.
83. 531 F.2d 900 (8th Cir. 1976).